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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: BOYD J. LAFFERTY, FDBA BOYD'S TEXAS STYLE BBQ RESTAURANT, FDBA BOYD'S BBQ WILDWOOD, and MARILYN K. LAFFERTY, AKA MARILYN K. O'DONNELL, FDBA BOYD'S TEXAS STYLE BBQ RESTAURANT, FDBA BOYD'S BBQ WILDWOOD, Debtors.	Chapter 13 Case No. 10-30822 (JHW)

MOTION OF CAPE BANK REQUESTING RELIEF FROM
THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362

Cape Bank, successor by merger with Boardwalk Bank ("Cape Bank") by and through its attorneys, Fox Rothschild LLP, respectfully request that this Court enter an order granting relief from the automatic stay pursuant to Section § 362(d)(1) and (d)(2) of Title 11 of the United States Code (the "Bankruptcy Code") (the "Motion"), and in support thereof, states as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. Venue of this proceeding and this Motion is proper in this district pursuant to 28

U.S.C. §§ 1408 and 1409.

3. The statutory predicate for the relief sought herein is 11 U.S.C. § 362 and Rule 4001 of Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

BACKGROUND

4. On or about July 7, 2010, Boyd J. Lafferty, fdba Boyd's Texas Style BBQ Restaurant, fdba Boyd's BBQ Wildwood; and Marilyn K. Lafferty, aka Marilyn K. O'Donnell[1], fdba Boyd's Texas Style BBQ Restaurant, fdba Boyd's BBQ Wildwood (the "Debtors"), filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code.

5. On or about July 8, 2010, Isabel C. Balboa was appointed the Chapter 13 Trustee (the "Trustee") in the Debtors' bankruptcy proceeding.

6. On or about July 21, 2010, the Debtors filed their Chapter 13 Plan (the "Plan").

The Home Equity Loan

7. On August 27, 2003, Marilyn K. O'Donnell executed and delivered to Cape Bank a Home Equity Credit Line Agreement and Note for the principal sum of $40,000.00 (the "Home Equity Note"). A true and correct copy of the Home Equity Note is attached hereto as **Exhibit "B"**. In order to further secure the obligations under the Home Equity Note, Marilyn K. O'Donnell executed and delivered to Cape Bank a mortgage ("Residential Mortgage I") on the premises located at 1606 Star Avenue, Villas, NJ 08251 (the "Residential Property"). A true and correct copy of Residential Mortgage I is attached hereto as **Exhibit "C"**.

The Commercial Loans

8. The Debtors owned and operated B + ML, Inc., a New Jersey corporation, d/b/a Boyd's Texas Style Barbeque Restaurant ("Boyd's BBQ"). Boyd's BBQ was located at 2301 Bayshore Road, Villas, New Jersey, but has closed. On April 12, 2007, March 27, 2008 and

[1] Marilyn K. O'Donnell married Boyd J. Lafferty, and changed her name to Marilyn K. Lafferty.

February 18, 2009, Boyd's BBQ, executed separate Business Loan Agreements to induce Cape Bank to make loans and other extensions of credit to Boyd's BBQ.

9. On April 12, 2007, Boyd's BBQ executed and delivered to Cape Bank a promissory note for the principal sum of $239,500.00 ("Note I") to evidence the terms for repayment of a loan in that amount.[2] A true and correct copy of Note I is attached hereto as **Exhibit "D"**. In order to secure Boyd's BBQ's obligations under Note I, Boyd J. Lafferty executed and delivered to Cape Bank a mortgage ("Commercial Mortgage I") on the property located at 2301 Bayshore Road, Villas, NJ 08251 (the "Commercial Property"). A true and correct copy of Commercial Mortgage I is attached hereto as **Exhibit "E"**.

10. On March 27, 2008, Boyd's BBQ executed and delivered to Cape Bank a promissory note for the principal sum of $125,000.00 to evidence the terms for repayment of a loan in that amount.[3] A true and correct copy of Note II is attached hereto as **Exhibit "F"**. In order to secure Boyd's BBQ's obligations under Note II, Marilyn K. Lafferty executed and delivered to Cape Bank a mortgage on the Residential Property ("Residential Mortgage II"). A true and correct copy of Residential Mortgage II is attached hereto as **Exhibit "G"**. In order to further secure Boyd's BBQ's obligations under Note II, Boyd J. Lafferty executed and delivered to Cape Bank a mortgage on the Commercial Property ("Commercial Mortgage II"). A true and correct copy of Commercial Mortgage II is attached hereto as **Exhibit "H"**.

11. On February 18, 2009, Boyd's BBQ executed and delivered to Cape Bank a promissory note for the principal sum of $40,000.00 to evidence the terms for repayment of a loan in that amount ("Note III").[4] A true and correct copy of Note III is attached hereto as

[2] The purpose of this loan was to refinance and consolidate three (3) Boardwalk Bank commercial loans and no new money was to be provided under this loan.
[3] The purpose of this loan was to purchase inventory for the new Boyd's Texas Style Barbeque on the Wildwood Boardwalk.
[4] The purpose of this loan was to replenish the company's cash position which was used to finance the start-up of the new location for Boyd's Texas Style Barbeque located on the Wildwood Boardwalk.

Exhibit "I". In order to further secure Boyd's BBQ's obligations under Note III, the Debtors executed and delivered to Cape Bank a mortgage in the original principal sum of $40,000.00 for the Residential Property ("Residential Mortgage III"). A true and correct copy of Residential Mortgage III is attached hereto as **Exhibit "J"**. In order to further secure Boyd's BBQ's obligations under Note III, Boyd J. Lafferty executed and delivered to Cape Bank a mortgage in the original principal sum of $40,000.00 for the Commercial Property ("Commercial Mortgage III"). A true and correct copy of Commercial Mortgage III is attached hereto as **Exhibit "K"**.

12. The Debtors and Boyd's BBQ each executed and delivered to Cape Bank written continuing Commercial Guarantees dated April 12, 2007, March 27, 2008 and February 18, 2009 by the terms of which the Debtors and Boyd's BBQ unconditionally and absolutely guaranteed to Cape Bank the full payment and performance of all indebtedness and obligations of Boyd's BBQ to Cape Bank, including the indebtedness and obligations under Notes I, II and III (the "Commercial Obligations").

13. The matter in controversy in this bankruptcy proceeding was also the subject matter of a suit on debt instruments action filed in the Superior Court of New Jersey, Law Division, Cape May County, Docket No. CPM-L-198-10, in the matter entitled Cape Bank v. B + ML, Inc., et als (the "Law Division Action"). The Law Division Action is related to only the Commercial Obligations. The Law Division Action complaint was filed on March 25, 2010, all defendants were served and default was entered against them on May 7, 2010. The Honorable Daryl F. Todd, Sr., entered final judgment by default on June 30, 2010 (the "Judgment"), in the sum of $452,565.28, plus interest from and including May 26, 2010, through the date of The Judgment at the per diem default rate of $109.11, and post-judgment interest at the lawful rate in favor of Cape Bank and against B +ML, Inc., a New Jersey corporation; Boyd J. Lafferty; and

Marilyn K. Lafferty, all jointly, severally and in the alternative. The Judgment in connection with the Commercial Obligations was mailed on July 2, 2010 to the Superior Court Clerk in Trenton, New Jersey, requesting docketing the Judgment as a lien and assigning a Judgment Number.

14. The matter in controversy in this bankruptcy proceeding is also the subject matter of a residential mortgage foreclosure action filed in the Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. F-24296-10, in the matter entitled Cape Bank v. Boyd J. Lafferty, et ux (the "Residential Foreclosure Action"). The Residential Foreclosure Action complaint was filed on April 22, 2010, all defendants were served on May 27, 2010 and their time to file an answer or responsive pleading expired on July 1, 2010.

15. The matter in controversy in this bankruptcy proceeding is also the subject matter of a commercial mortgage foreclosure action filed in the Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. F-20911-10, in the matter entitled Cape Bank v. B + ML, Inc., et als (the "Commercial Foreclosure Action"). The Commercial Foreclosure Action complaint was filed on April 5, 2010, all defendants were served on May 27, 2010 and their time to file an answer or responsive pleading expired on July 1, 2010.

16. In their schedules, the Debtors allege that the value of the Residential Property is $60,000.00. See Debtors' Schedule A (ECF No. 12). Cape Bank retained Pete Byron Realty who prepared a broker's price opinion which valued the Residential Property at $129,000.000. A true and correct copy of the broker's price opinion is attached hereto as **Exhibit "L"** (the "Residential Broker's Opinion").

17. In their schedules, the Debtors allege that the value of the Commercial Property is $300,000.00. See Debtors' Schedule A. (ECF No. 12). Cape Bank retained James M. Hanson,

Associates, Inc. which appraised the Commercial Property and assigned a Fair Market Value of $230,000.00 as of March 1, 2010. A true copy of said appraisal is attached hereto as **Exhibit "M"** is $230,000.00 (the "Commercial Appraisal").

18. The current balance due and owing to Cape Bank pursuant to the Home Equity Note, Note II, and Note III and secured by the Residential Property (collectively the "Residential Loan Documents") is the sum of $234,730.46. The current balance due and owing to Cape Bank pursuant to Note I, Note II, and Note III and secured by the Commercial Property (collectively the "Commercial Loan Documents") is the sum of $452,565.28. The aggregate amount of debt due to Cape Bank for the four obligations is the sum of $492,258.22.

19. The Debtors' plan fails to pay Cape Bank any monthly payments or interests payments under the Commercial Loan Documents. The Debtors' Plan only provides for the Debtors to continue making payments under the Home Equity Note. Moreover, the Plan attempts to strip down Cape Bank's second mortgage on the Residential Property leaving $105,000.00 as unsecured and only $20,000.00 to be classified as secured. Cape Bank has a secured claim up to the current value of the Residential Property, and given the properly is grossly undervalued in the Plan, Cape Bank is entitled to a larger secured claim and additional payments inside the Plan to reflect the true value of its secured claim.

20. The Debtors have no equity in the Residential Property and no equity in the Commercial Property.

21. The Plan of the Debtors proposed to abandon the Commercial Property to Cape Bank. Upon information and belief there are other residential properties in Cape May County for Debtors to purchase or rent.

22. The Debtors have made no effort to provide adequate protection for the interests

of Cape Bank in either property.

RELIEF REQUESTED

23. By this Motion, Cape Bank seeks the entry of an order terminating the automatic stay as to Cape Bank pursuant to 11 U.S.C. §362(d)(1) or §362(d)(2) and to permit Cape Bank to exercise any and all of its rights and remedies under the Residential and Commercial Loan Documents and applicable law and equity.

BASIS FOR RELIEF

24. Section 362(a) of the Bankruptcy Code defines the scope of the automatic stay in pertinent part:

> [A] petition filed under…this title…operates as a stay…of –
>
> (1.) The commencement or continuation…of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (3.) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C. § 362(a).

25. Section 362(d) of the Bankruptcy Code provides that the bankruptcy court "shall" lift the automatic stay under two circumstances: (a) for "cause", or (b) if the debtor has no equity in such property and if the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(1)-(2).

26. "Cause" is an intentionally broad and flexible concept that must be determined on a case-by-case basis and permits a bankruptcy court, as a court of equity, to use its discretion to do what is just when examining inherently fact-sensitive situations. In re The Score Board, Inc.,

238 B.R. 585, 593 (D. N.J. 1999); In re Porter, 371 B.R. 739, 744-45 (Bankr. E.D. Pa. 2007). Although a bankruptcy court may examine a variety of factors, sufficient cause can be found based on a single factor. In re Rexene Prods Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992). The absence of payments on a secured loan is sufficient cause to entitle a secured creditor to relief pursuant to section 362(d)(1). In re Giles, 340 B.R. 543, 553 (Bankr. E.D. Pa. 2006). Moreover, in determining whether a secured creditor's interest is adequately protected, courts engage in an analysis of the property's "equity cushion" – the value of the property after deducting the claim of the creditor seeking relief from the automatic stay and all other claims. In re Indian Palms Associates, Ltd., 61 F.3d 197, 207 (3d Cir. 1995).

27. A debtor has no equity in property for purposes of Section 362(d)(2) when the debts secured by liens on the property exceed the value of the property. 4 COLLIER ON BANKRUPTCY ¶ 362.07[4], 362-98 (Alan N. Resnick & Henry J. Somme reds., 15th ed. rev.) (citing In re Indian Palms Assocs., Ltd., 61 F.3d 197 (3d Cir. 1995). It is the debtor's burden to prove that the property is necessary to an effective reorganization. See, In re Swedeland Dev. Group, Inc., 16 F.3d 552, 567 (3d Cir. 1994), and see, United States Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 375 (1988).

28. The relief from stay should be granted if the debtor has no reasonable likelihood of reorganization. 4 COLLIER ON BANKRUPTCY ¶ 362.07[4][B] 362-120 (Alan N. Resnick & Henry J. Somme reds., 15th ed. rev.). If the debtor's plan is unsupported by credible assumptions and projections that offer some basis for confidence that the plan could succeed, the necessity of the property is not shown. See In re Pegasus Agency, Inc., 101 F.3d 882 (2d Cir. 1996).

Stay Relief for Cause – No Equity Cushion

29. In this case, "cause" exists to terminate the stay and to allow Cape Bank to exercise all of its rights under the Residential Loan Documents. First, the Debtors continue to enjoy the benefits of the possession, control, and use of the Commercial Property without making any regular monthly payments or interest payments, and the Debtors continue to enjoy the benefits of the possession, control, and use of the Residential Property without making any regular monthly payments or interest payments except under the Home Equity Note. Second, the interests of Cape Bank are not adequately protected. The Plan grossly undervalues the value of the Residential Property at $60,000.00, while the Broker Price Opinion values the Residential Property at $129,000.00. After deducing the $234,730.46 claim of Cape Bank, the Debtors have no equity cushion in the Residential Property, irrespective of which value is assigned to the Residential Property. Moreover, the interest of Cape Bank in the Residential Property is only protected up to $60,000.00 in the Plan. Therefore, the interest of Cape Bank in the Residential Property is not adequately protected, and the automatic stay should be terminated.

No Equity, Value or Benefit

30. The Debtors have no equity in either of the Residential Property or the Commercial Property, and neither property has any value or benefit to the Estate. The current balance due and owing to Cape Bank by Debtors under the Residential Loan Documents is $234,730.46. Even at $129,000.00, Debtors have no equity. The current balance due and owing to Cape Bank by Debtors under the Commercial Loan Documents is $452,565.28. Even at $300,000.00, the Debtors have no equity. In addition, the Debtors have provided no evidence that either of the Residential Property or the Commercial Property is necessary for their effective rehabilitation. The Debtors also have no reasonable likelihood of reorganization. The Plan is

too tenuous, has no source of funding, and is therefore on a path to failure. The Debtors have proposed to fund the Plan with combined future earnings of $3,690.54 per month. Less current expenditures, the Debtors expect to have a net monthly income of $296.54. But this is before accounting for the extra value of the Residential Property which requires greater payments to Cape Bank. The Debtors propose to fund the plan by paying $200 per month to the Chapter 13 Trustee for 12 months, and $860.00 for an additional 48 months. Thus, the Debtor has not proposed a fair and feasible plan regarding Cape Bank's interest, has no equity in the Commercial or Residential Property, and have no reasonable likelihood of reorganization.

31. Based on the foregoing, the absence of adequate protection, the lack of any equity, and the absence of a reasonable likelihood of reorganization, provide cause to relief from the automatic stay for Cape Bank under Section 362(d)(1) and (d)(2) of the Bankruptcy Code.

WHEREFORE, Cape Bank respectfully requests that this Court (i) grant the Motion; (ii) enter an order terminating the automatic stay as to Cape Bank and permitting Cape Bank to exercise any and all of its rights and remedies under the Residential Loan Documents, Commercial Loan Documents, and applicable law and equity; and (iii) granting such other relief as is just and proper.

Dated: August 11, 2010

FOX ROTHSCHILD LLP

By: */s/ Brian R. Isen*

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